TAN CHONG & SONS MOTOR CO SDN BHD

v.

BORNEO MOTORS (M) SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: (S2) P84-1979]
10 MAY 2001

TORT: *Defamation - Libel - Whether statements published were defamatory - Principles applicable - Whether statements published were injurious to plaintiff's trade - Whether advertisements referred to plaintiff's new motor vehicle - Whether statements were justified*

TORT: *Malicious falsehood - Whether malice proved*

TORT: *Defamation - Damages - Factors to be considered*

The plaintiff was the sole and exclusive importer and distributor of motor vehicles in Malaysia bearing the trade marks Datsun and Nissan for Nissan Motor Co Ltd of Japan. The 1st defendant was in the same business but traded in Toyota motor vehicles. Since the 1970s, the plaintiff and the 1st defendant were the two main competitors for the car market in Malaysia. The 2nd defendant was a media specialist and had advertised for and on behalf of the 1st defendant at the material time.

In conjunction with the release of the new Datsun B310/120Y into the Malaysian market, the plaintiff inserted an advertisement in The New Straits Times on 15 July 1978 to inform the public of the availability of the new model. The advertisement occupied a half page and carried a lateral-view picture of the plaintiff's new model which portrayed clearly the trade mark Datsun affixed on the rear lateral-side of the new model.

In The New Straits Times of 28 July 1978 and 4 August 1978, the defendants printed and published an advertisement with a lateral-view picture of the plaintiff's new Datsun alongside that of a lateral-view picture of the Toyota Corolla motorcar marketed by the 1st defendant with the following words: "IMITATION IS THE SINCEREST FORM OF FLATTERY" – and beneath the picture of the Datsun: "THIS CAR IS NEW TO THE MALAYSIAN ROADS" – and beneath the picture of the Toyota: "This car, the TOYOTA COROLLA, has four years of proven reliability behind it and costs over a thousand dollars less in Peninsular Malaysia. But then, flattery will get you nowhere. TOYOTA". Further, on 8 August 1978, another advertisement as

follows: "THEY'VE CAUGHT UP WITH THE WAY WE LOOK, BUT OVERTAKEN US ON PRICE." In the same advertisement, juxtaposed between the pictures of the two models, the defendants printed the following words: "But we're not worried. Anyone can imitate our looks, but it's not quite so easy to imitate our price. Toyota Corolla is around a thousand dollars less in Peninsular Malaysia. And as for Toyota dependability, that they can never overtake, they just follow, a long, long way behind. TOYOTA".

The plaintiff claimed trade libel and malicious falsehood and prayed for damages for injury as a result of a general loss of trade or business in particular a loss of trade in the sale of the new Datsun B310/120Y; special damages on the number of units sold; an order of court that the defendants withdraw the advertisements and publish and apology; and costs. The defendants contended that the advertisements did not refer to the plaintiff's new Datsun B310/120Y and that there was no malice in their publication.

The main issues before the court was whether the words were defamatory and whether the plaintiff was the "person" defamed.

Held:

[1] An action for libel will lie where there is a written statement published without lawful justification, or excuse, calculated to convey to those to whom it is published, an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt, or ridicule. The statements in the advertisements were of the kind that was calculated to be injurious to the plaintiff in its trade.

[2] From the defendants' advertisements, it was very clear that the "other" car in the comparison with the 1st defendant's Toyota Corolla was the plaintiff's new Datsun B310/120Y. It was obvious therefore that the defendants' remarks were made of and concerning the plaintiff's new Datsun B310/120Y, and were false.

[3] It appeared from the defendants' advertisements that the publication was not intended solely to promote the sale of the 1st defendant's Toyota Corolla cars but rather was intended with the predominant purpose of discrediting the new Datsun B310/120Y and the plaintiff company.

[4] It was clear that the defendants in using the word "imitation" in the advertisements were defaming the plaintiff by unjustly and maliciously accusing it of dealing in the new Datsun B130/120Y which was, according to the defendants, an imitation of the 1st defendant's Toyota Corolla. The ordinary and natural meaning of the word "imitation" used in the context of the defendants' advertisements meant and/or was

understood to mean that the plaintiff's new Datsun B130/120Y was an imitation of the 1st defendant's Toyota Corolla. This also meant that: (i) the plaintiff's new Datsun B310/120Y was inferior to the 1st defendant's Toyota Corolla; (ii) the plaintiff was dishonest and untrustworthy by misrepresenting to the public that its new Datsun B310/120Y was not what it was represented to be; and (iii) the plaintiff was misrepresenting it as original and new when it was not.

[5] In construing the words published in an article, the whole article is to be construed when determining whether the words complained of contains any defamatory imputations. The words and pictures published in the defendants' advertisements in The New Straits Times, when read as a whole, coupled with the fact that the plaintiff had only a few days before advertised its new Datsun B310/120Y in the same newspaper, and the fact that no other similar models were in the market at the material time, were defamatory of the plaintiff and referred to no one else but the plaintiff.

[6] The plaintiff's new Datsun B130/120Y was not an imitation of the 1st defendant's Toyota Corolla. The plaintiff's Datsun B130/120Y was a new model and its design was registered in Japan. The claim made by the defendants that the Datsun B310/120Y was less reliable than the Toyota Corolla was also never established.

[7] It was obvious that the defendants had gone to great pains to dress up their advertising material in disparagement of the plaintiff's goods, and since their advertisements had been shown to be false and the plaintiff has succeeded in showing malice, the plaintiff had proved its case of malicious falsehood against the defendants.

[8] For damages on libel, the relevant factors to be considered are the plaintiff's standing in society, the extent of the publication, the injury to the plaintiff and the conduct of the defendants. Being a corporation having a total of 11 branches all over Malaysia, the plaintiff's reputation is extensive and well known in Malaysia. The extent of the publication of the 1st defendant's advertisements was wide as The New Straits Times was sold throughout the whole of Malaysia and had a greater potential to harm the plaintiff. The natural grief and distress which the directors and officers of the plaintiff had felt at having been spoken of in defamatory terms, and the injury to the plaintiff's pride and self-confidence were also matters to be considered. The defendant's conduct proved non-repentant, as they not only refused an apology to the plaintiff, but also denied liability. Taking all these factors, the plaintiff was awarded the sum of RM500,000 in damages for libel.

[9] The plaintiff's reputation was injured as Datsun/Nissan vehicles have always been associated with the plaintiff, and hence, any false advertisements attacking the Datsun cars would seriously affect the plaintiff's reputation as well. Further, the plaintiff has over the years painstakingly built substantive goodwill, reputation and image as the sole importer and distributor of Datsun/Nissan cars, which are generally regarded as good quality cars. Taking all factors into consideration, the plaintiff was awarded RM500,000 as damages inclusive of aggravated damages for malicious falsehood.

[10] The plaintiff had failed to prove special damages. The court therefore made no award under this head. The 1st defendant would bear 75% of the awards and the 2nd defendant 25% of the same.

[Orders accordingly.]

Case(s) referred to:

Chua Jui Meng v. Hoo Kok Wing & Anor [2000] 6 CLJ 390 ***(refd)***

De Beers Abrasive Products Ltd, De Beers Industrial Diamonds (Ireland) Ltd and Diamond Products (Sales) Ltd v. International General Electric Company of New York Ltd and General Electric Company [1975] FSR 323 ***(foll)***

Horrocks v. Lowe [1974] 1 All ER 662 ***(refd)***

Khodaparast v. Shad [2000] 1 All ER 545 ***(foll)***

Lyne v. Nicholls [1906] 23 TLR 86 ***(foll)***

Mark Sallows v. Laurie Griffiths [2001] 15 FSR 188 ***(foll)***

Noor Asiah Mahmood & Anor v. Randhir Singh & Ors [2000] 5 CLJ 407 ***(foll)***

Ratus Mesra Bhd v. Shaik Osman Majid [1999] 8 CLJ 499 ***(refd)***

Schindler Lifts Australia Pty Ltd & Anor v. Milan Debelak & Ors 15 IPR 129 ***(foll)***

Sin Heak Hin Tyres Pte Ltd v. Yuasa Battery Singapore Co Pte Ltd [1995] 3 SLR 590 ***(foll)***

Tang Liang Hong v. Lee Kuan Yew & Anor [1998] 1 SLR 97 ***(foll)***

Timothy White v. Gustav Mellin [1895] AC 154 ***(refd)***

Tjanting Handicraft Sdn Bhd & Anor v. Utusan Melayu (Malaysia) Bhd & Ors [2001] 3 CLJ 571 ***(foll)***

Uren v. John Fairfax and Sons Pty Ltd [1965-1966] 117 CLR 118 ***(refd)***

Wilts United Dairies Ld v. Thomas Robinson Sons & Coy Ld [1957] 9 RPC 220 ***(foll)***

Legislation referred to:

Evidence Act 1950, s. 73A

For the plaintiff - Nagarajah Muttiah (Grace Ho); M/s Shook Lin & Bok

For the defendants - Rueben Mathiavaranam (Gurbakh Singh & Francis Tan); M/s Azman, Davidson & Co

Reported by Cindy Chan

JUDGMENT

RK Nathan J:

Facts

The plaintiff is in the business of importing and selling of vehicles and commenced its trade in 1959 as a company dealing with importation and sale of motor vehicles bearing the Datsun and Nissan brands. The plaintiff is the sole and exclusive importer and distributor of motor vehicles in Malaysia bearing the trade marks Datsun and Nissan for the Japanese company, Nissan Motor Co Ltd (Nissan) of Yokohama, Japan. Nissan is the manufacturer of the aforesaid vehicles. The plaintiff derives its sole importer and distributorship rights from the Distribution Agreement signed between the plaintiff and Nissan dated 1 April 1973 (the agreement), and which agreement has since been renewed. The plaintiff commenced importing and distributing the Datsun/Nissan motor vehicles in Malaysia since 1959 and does not import or distribute any other brand of passenger vehicles. The imported Datsun/Nissan vehicles generally come in two forms, namely:

(a) in completely knocked down (CKD) form and thereafter, assembled in Malaysia in accordance with Nissan's specifications and design for distribution; and

(b) in completely built-up (CBU) form.

As the sole importer and distributor for Nissan, the plaintiff is also required to provide after sales service, such as maintenance services for its customers and to maintain sufficient spare parts and make available to customers well equipped service facilities and efficient skilled engineers for effective operation of maintenance and repair services. The purpose of these obligations is to maintain the reputation and image of Datsun/Nissan and the plaintiff, with regard to the Datsun/Nissan motor vehicles. Nissan is the owner and registered proprietor of the Datsun and Nissan trade marks under Registration Nos. M/29841 and M/29840 for Datsun and Registration Nos. M/29845 and M/29839 for Nissan. The plaintiff is the registered user of the above registration in Malaysia and has the exclusive rights to use the said trade marks in Malaysia.

The 1st defendant dealt in the same business as the plaintiff in the 1970s, that is, in the importation and distributorship of motor vehicles, the principle difference being that the 1st defendant traded in Toyota motor vehicles. Since the 1970s, the plaintiff and the 1st defendant were rivals in the motor vehicle trade and are the two main competitors for the car market in Malaysia although there were other companies in the trade in the 1970s such as Asia Motor, Fiat Distributors, Cycle and Carriage Bintang Bhd, etc.

The 2nd defendant is a media specialist and had advertised for and on behalf of the 1st defendant at the material time.

In the later part of the 1970s, the plaintiff distributed the new Datsun B310/120Y with an original design and additional accessories, as its latest model passenger car. The said model was released into the Malaysian market in or about the month of July 1978. The new Datsun B310/120Y model was assembled in Malaysia with the approved market price of RM13,650.40. The plaintiff contended that the new Datsun B310/120Y possessed an original design based on the fact that the car's design had been planned, based on research done on the prevailing fashion and trends of the world car market, at the time. Nissan's specialists had worked hard on the originality factor of the new car and at no time did they imitate another car maker's works. The design for the new Datsun B310/120Y is registered in Japan in the name of Nissan. There is presently no proceeding instituted by the defendants opposing the registered design of Nissan in Japan or Malaysia.

The Publication

In conjunction with the release of the new Datsun B310/120Y into the Malaysian market the plaintiff caused an advertisement to be inserted in The New Straits Times in its issue on 15 July 1978 to inform the public of the availability of the new model. The advertisement was captioned as follows:

> Stop Press
> Now In Malaysia
> The Exciting **Refined** All New
> Datsun B310
> 120Y

The said advertisement further carried in bold letters the following words:

> The All-New Datsun B310/120Y
>
> Adding New Dimensions
>
> To Total Economy

The advertisement occupied a half page of the newspaper and carried a lateral view picture of the plaintiff's new model of a size approximately 15-inch length x 5-inch breadth. The said picture of the new model portrayed clearly the trade mark Datsun affixed on the rear lateral side of the new model, as is usual in every unit of the said model. In the issues of The New Straits Times for 28 July 1978 on pp. 8 and 9 and for 4 August 1978 on pp. 12 and 13, the defendants and each of them printed and published and/or caused to be printed and published of and concerning the plaintiff in the form of an advertisement a lateral view picture of the plaintiff's new model Datsun B310/

120Y motor car alongside that of a lateral view picture of the Toyota Corolla model motor car marketed by the 1st defendant beneath the words following in bold type, that is to say:

Imitation Is The Sincerest Form Of Flattery

In the same advertisement the defendants also printed and published and/or caused to be printed and published beneath the picture of the plaintiff's said new model the words following, that is to say:

This Car Is New To The Malaysian Roads

and beneath the picture of the 1st defendant's model as aforesaid the following words:

This car, the Toyota Corolla, has four years of proven reliability behind it and costs over a thousand dollars less in Peninsular Malaysia. But then, flattery will get you nowhere.

TOYOTA

Again in its issue on 8 August 1978 on pp. 10 and 11 of The New Straits Times the defendants printed and published and/or caused to be printed and published of and concerning the plaintiff in the form of another advertisement the words following, that is to say:

They've Caught Up With The Way We Look, But Overtaken Us On Price.

The defendants also caused to be printed and published in bold type as a caption above the picture, this time, of part only of the plaintiff's Datsun B310/120Y model exhibiting only its rear lateral side view and a full picture of the whole of the said lateral view of the 1st defendant's Toyota Corolla model.

In the same advertisement, juxtaposed between the pictures of the aforesaid two models the defendants printed and published or caused to be printed and published, the following words:

But we're not worried. Anyone can imitate our looks, but it's not quite so easy to imitate our price. Toyota Corolla is around a thousand dollars less in Peninsular Malaysia. And as for Toyota dependability, that they can never overtake, they just follow, a long, long way behind.

TOYOTA

The Plaintiff's Claim

The plaintiff is claiming under two general categories, that is, trade libel and malicious falsehood; and prayed for against the defendants and each of them:

(a) Damages for injury as a result of a general loss of trade or business and in particular a loss of trade or business in the sale of its new Datsun B310/120Y model.

(b) Special damages on the number of units sold to date of judgment.

(c) An order of court that the defendants and each or either of them on behalf of the other do unreservedly withdraw the advertisements and publish an apology to the plaintiff for libel, falsehood, on terms to be approved by the court and that the said apology or statement be caused to be printed and published by the defendants in The New Straits Times of equal size and prominence and for the similar number of days as the publication of the impugned advertisements.

(d) Costs.

(e) Such further or other relief.

Findings Of The Court

The defendants admit publication of the words in the advertisements. The issue therefore turns to whether, (i) those words were defamatory, and (ii) the plaintiff was the "person" defamed.

The plaintiff had advertised and publicised the release of the new Datsun B310/120Y extensively in Malaysia. The plaintiff had circulated pamphlets and brochures of the Datsun B310/120Y at its headquarters and 11 branch offices and showrooms throughout the country. The brochures set out the specifications of the new Datsun B310/120Y. Ang Boon Beng (PW2) testified that the public response to the new Datsun B310/120Y was very good. Being the Supervisor in the Sales Division at the time, he received a substantial amount of enquiries from the public on the new Datsun B310/120Y. Indeed, bookings and sales of the new Datsun B310/120Y were overwhelming following its launch in Malaysia.

Soon thereafter, the 1st defendant responded to the launch of the plaintiff's Datsun B310/120Y and together with the 2nd defendant, placed advertisements against the plaintiff's new model. Mr. Philip Yew Hock Tat (PW1), the present Deputy General Manager and the then Credit Officer testified that the time frame between the plaintiff's advertisement on 13 July 1978 with those of the defendants was just days apart, with the defendants' first advertisement on 28 July 1978.

An action for libel will lie where there is a written statement published without lawful justification, or excuse, calculated to convey to those to whom it is published, an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt, or ridicule. I find that the statements in the advertisements are of the kind which were calculated to be injurious to the plaintiff in its trade. As to whether such words were intended to refer to the plaintiff I need to only repeat what I had said in *Tjanting Handicraft Sdn Bhd & Anor v. Utusan Melayu (Malaysia) Berhad and 3 Ors* [2001] 3 CLJ 571 at p. 586 of the judgment:

> In an action for slander of goods for libel it is not necessary that the words should refer to the plaintiff by name, so long as the words would be understood by reasonable people to refer to the plaintiff. The Court must be satisfied as to whether the libel designated the plaintiff in such a way as to let those who know him understand that he was the person referred to.

From the defendants' advertisements, it is very clear that the "other" car in the comparison with the 1st defendant's Toyota Corolla is the plaintiff's new Datsun B310/120Y. It is obvious therefore that the defendants' remarks were made of and concerning the plaintiff's new Datsun B310/120Y and were false. The defendants contend that the advertisements did not refer to the plaintiff's new Datsun B310/120Y. However, as found in *Sin Heak Hin Tyres Pte Ltd v. Yuasa Battery Singapore Co Pte Ltd* [1995] 3 SLR 590 the fact that the disparaging advertisements did not specifically identify the plaintiff is, immaterial. Further the vehicle depicted in all of the defendants' advertisements does refer to the plaintiff's new Datsun B310/120Y and not to any other vehicle because:

(a) the plaintiff had earlier placed an advertisement in The New Straits Times on 13 July 1978, depicting the new Datsun B310/120Y model, which is identical in all respects with the unidentified vehicle in the defendants' advertisements;

(b) by virtue of the proximity of the plaintiff's advertisement to those of the defendants', the first of which followed some ten days after, on 28 July 1978;

(c) the plaintiff had used the words "Now In Malaysia! The Exciting Refined All New Datsun B310/120Y" in its advertisement dated 13.7.78 and the defendants' almost similar advertisements followed shortly after, beginning first with the advertisement on 28 July 1978 which used the words, "This car is new to the Malaysian roads" beneath the picture of the car which is identical to the plaintiff's new Datsun B310/120Y;

(d) the defendants also used the words "Toyota Corolla is around a thousand dollars less in Peninsular Malaysia" which is also a reference to the plaintiff's Datsun new B310/120Y which was sold at about RM1,000 more than the 1st defendant's Toyota Corolla at the material time; and

(e) apart from the plaintiff's new Datsun B310/120Y model, there were no other similar models with similar designs in the market at the material time.

Further, it appeared from the defendants' advertisements that the publication was not intended solely to promote sale of the 1st defendant's Toyota Corolla cars but rather was intended with the predominant purpose of discrediting the new Datsun B310/120Y and the plaintiff company. It is pertinent to note that the fact of the plaintiff and the 1st defendant being close competitors has never been denied by the defendants.

I find that the said advertisements were published in a manner so as to indicate to the public that the plaintiff's new Datsun B310/120Y was an imitation of the 1st defendant's Toyota Corolla. This certainly is not true. By the ordinary and natural meaning of the words, "Imitation is the sincerest form of flattery … this car is new to the Malaysian roads … this car, the Toyota Corolla, has four years of proven reliability behind it … but then, flattery will get you nowhere" the defendants meant that the plaintiff's Datsun B310/120Y was an imitation of the 1st defendant's Toyota Corolla, which was already in the Malaysian market for four years at the material time. Further, the words meant that in spite of the plaintiff's imitation of the Toyota Corolla's looks, such imitation was lacking by far, since the new Datsun B310/120Y was not as reliable as the Toyota Corolla. The words also gave the connotation that the plaintiff was dishonest and untrustworthy by its representations to the Malaysian public that its Datsun B310/120Y was new in the market, when in fact, according to the defendants, this was not the case and the model was actually an imitation of the 1st defendant's Toyota Corolla. The 1st defendant, being a member of the car trade, ought to have known the falsity of the statements made in its advertisements in The New Straits Times, but blatantly disregarded the truth. In printing and publishing and/or causing to be published the said advertisements, the 2nd defendant too failed to verify the truth of the said advertisements with the plaintiff prior to the publications.

In the case of *Sin Heak Hin Tyres Pte Ltd v. Yuasa Battery Singapore Co Pte Ltd (supra)* the words at issue were that "the plaintiffs' batteries were imitation batteries". The precise statement as published by the defendant in para. 2 of its circular reads as follows:

> We categorically state herein that Yuasa Battery Co Ltd Japan do not have a manufacturing facility in the People's Republic of China. Such 'Yuasa' brand batteries are therefore illegal imitation of our registered brand.

Judith Prakash J in holding that such words were defamatory of the plaintiff said at p. 437:

> It is not disputed that for defamation to be established, the words complained about must be defamatory of the plaintiffs in that the natural and ordinary meaning of such words would tend to lower the plaintiffs in the estimation of right thinking members of society generally or would convey an imputation on them which disparages them in their trade or business.

Her Ladyship continued at p. 439:

> … Some at least of the recipients when reading para 2 of the circular would have realised that it was directed at the Yuasa batteries imported by the plaintiffs. Accordingly, the natural and ordinary meaning of para 2 was that the Yuasa brand batteries imported by the plaintiffs from China for sale in Singapore were imitations of the defendant's Yuasa batteries. In this context the fact that the paragraph does not specifically identify the first plaintiff as the importer is, I think, immaterial.

And at p. 440, her Ladyship stated:

> I therefore conclude that the words complained about in paras 2 and 4 of the circular are in their natural and ordinary meaning defamatory of the plaintiffs. It would lower the reputation of any business in Singapore if it was accused of dealing in imitation goods and of holding out such goods as being authentic goods. Such statements are also defamatory in the sense that they disparage the plaintiffs in the way that they conduct their business.

Applying this case to the facts of the present case, it is clear that the defendants in using the word "imitation" in the advertisements were defaming the plaintiff by unjustly and maliciously accusing it of dealing in the new Datsun B310/120Y which was, according to the defendants an imitation of the 1st defendant's Toyota Corolla and of holding out the model as an authentic one. I find that the ordinary and natural meaning of the word "imitation" used in the context of the defendants' advertisements meant and/or was understood to mean, that the plaintiff's new Datsun B310/120Y was an imitation of the 1st defendant's Toyota Corolla. This also meant that:

(a) the plaintiff's new Datsun B310/120Y is inferior to the 1st defendant's Toyota Corolla;

(b) the plaintiff is dishonest and untrustworthy by misrepresenting to the public that its new Datsun B310/120Y was not what it was represented to be; and

(c) the plaintiff was misrepresenting it as original and new when it was not.

In construing words published in an article, the whole article is to be considered when determining whether the words complained of contain any defamatory imputations. I said in the case of *Noor Asiah Mahmood & Anor v. Randhir Singh & Ors* [2000] 5 CLJ 407 at p. 418 while referring to my earlier judgment in *Ratus Mesra Sdn Bhd v. Shaik Osman Majid* [1999] 8 CLJ 449 as follows:

> It was argued by the defendants that the plaintiffs had not identified the specific words or sentences that are defamatory of them. To my mind the law of defamation would remain impotent if the courts were to put such a narrow and simplistic interpretation. Not only words and sentences can be defamatory, it is also possible, after reading the entire article, to hold that the said article read as a whole is defamatory of the plaintiff because of the chain of events entwined throughout the article, to form a tapestry, that portrayed the plaintiffs as the ones defamed.

I therefore find that the words and pictures published in the defendants' advertisements in The New Straits Times, which when read as a whole, coupled with the fact that the plaintiff had only a few days prior advertised its new Datsun B310/120Y in the same newspaper, and the fact that no other similar models were in the market at the material time, defamatory of the plaintiff and referred to no one else but the plaintiff.

I find that the plaintiff's new Datsun B310/120Y was not an imitation of the 1st defendant's Toyota Corolla. The plaintiff's Datsun B310/120Y was a new model and its design was registered in Japan. The alleged claim made by the defendants that the Datsun B310/120Y is less reliable then the Toyota Corolla was also never established. It is always possible for the defendants to have known of the various specifications and the quality of the new Datsun B310/120Y before the placement of the defamatory advertisements due to the plaintiff's promotion of the car's launch and also with the easy availability of pamphlets and brochures containing specifications of the new Datsun B310/120Y in the plaintiff's many showrooms and in all the 11 branches and sub-branches.

Further, the new Datsun B310/120Y and the 1st defendant's Toyota Corolla are different in many respects. A comparison of the technical specifications made by the plaintiff of both cars shows that the models are different in many respects and in actual fact, had showed that the Datsun B310/120Y

is better in some of the specifications and features than the Toyota Corolla. The comparison clearly shows the differences between the cars and supports the plaintiff's submission on the quality of the new Datsun B310/120Y and serves also to disprove the defendants' allegation that the new Datsun B310/120Y is an imitation of the Toyota Corolla. These findings have not been controverted by the defendants.

The table of comparisons which shows that the new Datsun B310/120Y is better than the Toyota Corolla is as follows:

(i) Under the heading "Engine", the new Datsun B310/120Y possessed 1171 cc, with a maximum power of 69 hp @ 6000 rpm and a maximum torque of 70.1 1 b-ft @ 4000 rpm, whereas the Toyota Corolla possessed 1166 cc, with a maximum power of 55 hp/6000 rpm and a maximum torque of 61 1 b-ft/3900 rpm.

(ii) Under the heading "Performance 8s Fuel Consumption" the Datsun car possessed a speed of 0-62 mph in 14.5 seconds, and a consumption of 43 mpg, whereas the Toyota Corolla had a speed of 0-60 mph in 16 seconds with a consumption of 38 mpg.

(iii) The guarantee period for Datsun was 12 months whereas for Toyota Corolla it was 6000 miles or six months whichever is earlier.

(iv) The Datsun B310 was equipped with the anti-skid valve to prevent wheels from suddenly locking during emergency stops, whereas Toyota Corolla was equipped with servo-assisted brake only.

(v) The body construction for Datsun B310/120Y is monocoque with front rear impact zones to absorb initial shock during collision, whereas the Toyota's body construction is integral.

I note that the above comparisons were never challenged by the defendants in cross-examination. The table of comparisons did not in any way show that the new Datsun B310/120Y was less dependable than the Toyota Corolla. Neither was this controverted by the defendants.

In the circumstances, I find for the plaintiff in libel against both the defendants.

Malicious Falsehood

The plaintiff is also claiming for damages against the defendants for malicious falsehood in publishing and/or causing the publication of the above advertisements.

I have stated the ingredients necessary to prove this tort in *Ratus Mesra (supra)* at p. 512:

> To establish this tort the plaintiff will have to prove:
>
> (a) That the defendant has published about the plaintiff words which are false.
>
> (b) That they were published maliciously.
>
> (c) That special damage has followed as the direct and natural result of their publication. The common law position is now altered by s. 6 of the Defamation Act 1957 which states as follows:
>
> (1) In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage:
>
> (a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
>
> (b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

The defendants are alleging that there was no malice in the publications of the advertisements. I find that all the ingredients for malicious falsehood have been satisfied and that the defendants have failed to prove that there was no malice in the said publications.

In *De Beers Abrasive Products Limited, De Beers Industrial Diamonds (Ireland) Limited and Diamond Products (Sales) Limited v. International General Electric Company of New York Limited and General Electric Company* [1975] FSR 323, the plaintiffs alleging that the pamphlet contained a number of misstatements and was misleading, issued a writ claiming damages for defamation of goods, and for unlawful interference and/or unfair competition in trade.

The court held that a trader is entitled to "puff" his goods, but, if he turns to denigrate the goods of a rival, there comes a point where this becomes actionable. This point is reached if a reasonable man would take the untrue claim being made about those goods as a serious claim, the plaintiff being able to prove malice. Since in that case, the pamphlet contained statements in disparagement of the plaintiffs' goods, and those statements must have been intended to be taken very seriously, there was a reasonable cause of

action. In arriving at his decision, Walton J at p. 328 referred to the speech of Lord Watson in *Timothy White v. Gustav Mellin* [1895] AC 154 at p. 167:

> … In order to constitute disparagement which is, in the sense of law, injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and untrue; and that they have occasioned special damage to the plaintiff.

In *Lyne v. Nicholls* [1906] 23 TLR 86, Swinfen-Eady J held that "the statement that the circulation of a particular newspaper was 'twenty to one of any other weekly paper in the district', and that, 'where others count by the dozen, we count by the hundred,' were not merely puffs, but were to be taken seriously."

In the case before me it is obvious that the defendants had gone to great pains to dress up their advertising material in disparagement of the plaintiff's goods and since their advertisements have been shown to be false and the plaintiff has succeeded in showing malice, I also find that the plaintiff has proved its case of malicious falsehood against the defendants.

In *Schindler Lifts Australia Pty Ltd & Anor v. Milan Debelak & Ors* 15 IPR 129 on the issue of injurious falsehood, it was held that the necessary element is either knowledge of falsity or recklessness. The respondents' assertion that they merely wished to get business is no defence. No doubt exaggerations of the demerits of other goods or services are common enough in business. In the present case the respondents went beyond mere generalisation and committed the tort.

In *Wilts United Dairies, Ld. v. Thomas Robinson Sons & Coy., Ld.* [1957] 9 RPC 220, on the issue of malicious falsehood, Stable J said at p. 237:

> … As I understand the law it is this, that if you publish a defamatory statement about a man's goods which is injurious to him, honestly believing that it is true, your object being your own advantage and no detriment to him, you obviously are not liable. If you publish a statement which turns out to be false but which you honestly believe to be true, but you publish that statement not for the purpose of protecting your own interests and achieving some advantage to yourself but for the purpose of doing him harm, and it transpires, contrary to your belief, that the statement that you believed to be true has turned out to be false, notwithstanding the *bona fides* of your belief because the object that you had in mind was to injure him and not to advantage yourself, you would be liable for an injurious falsehood.

> The third proposition which I derive from the cases is this, that if you publish an injurious falsehood which you know to be false, albeit that your only object is your own advantage and with no intention or desire to injure the person in relation to whose goods the falsehood is published, then provided that it is clear from the nature of the falsehood that it is intrinsically injurious – I say 'intrinsically', meaning not deliberately aimed with intent to injure but as being inherent in the statement itself, the defendant is responsible, the malice consisting in the fact that what he published he knew to be false.

I find that the 1st defendant published its advertisements in disparagement of the plaintiff's new Datsun B310/120Y knowing that it is false or recklessly indifferent as to whether it is true or false, with the intention of causing harm to the plaintiff's business. The fact that the 1st defendant knew what it was saying was intrinsically injurious and the fact that it knew the statements were not true, and having regard to the fact it was in the same business of importing and distributing cars and the fact that it was the business rival of the plaintiff, all these show that there was malice on the part of the 1st defendant.

The 2nd defendant on the other hand had caused to be published the said advertisements in The New Straits Times recklessly indifferent as to whether the statements made in the advertisements were true or false, or whether it presented a fair picture or a misleading one. This is clear from the evidence of Ding Liang Wong of the 2nd defendant, who testified that he did not take any independent steps to verify the information given by the 1st defendant. In fact, Mr. Ding went on to say that the 1st defendant had given its approval for the advertisement.

As was pointed out by the High Court of Australia in *Uren v. John Fairfax and Sons Pty Ltd* [1965-1966] 117 CLR 118 on the point of malice at p. 125:

> It is said in *Gatley on Libel and Slander*, 5th ed. (1960), p. 573: 'So where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown that the imputation was groundless, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, a jury may rightly infer malice.

It must be noted that in *Timothy White (supra)*, where the defendant affixed on the label that the defendant's food for infants and invalids was far more nutritious and healthful than any other, the House of Lords held that there is no cause of action on malicious falsehood. This is because it is lawful

for the defendant to state that its goods are better than any other traders' goods so long as the defendant does not comment on another trader's goods by disparaging those goods.

In the case before me in the three advertisements in The New Straits Times, the 1st defendant did not comment merely on the superiority of its Toyota Corolla as compared to the plaintiff's new Datsun B310/120Y, but went further to make disparaging statements concerning the plaintiff's new Datsun B310/120Y. The intention of the 1st defendant in printing and publishing and/or causing to be printed and published such words and comparisons in the aforementioned advertisements, was to cause damage to the plaintiff's reputation, goodwill and business. The plaintiff at the said material time was the main competitor of the 1st defendant. Further, the response to the new Datsun B310/120Y was overwhelming when it was first launched and sales of the Toyota Corolla dropped in the month of July 1978 as compared to June 1978 upon the introduction of the new Datsun B310/120Y. I therefore have no hesitation in concluding that the plaintiff could have been viewed by the 1st defendant as a threat, thereby prompting the defendants to resort to such malicious and false advertising to discredit the plaintiff.

It can be seen from the table in the Common Agreed Bundle of Documents (CABD 116) that after the said defamatory advertisements, the sales of the Toyota Corolla showed an increase between the months of July to September 1978. It is clear from the sales figures that because of the attack against the plaintiff's cars, the 1st defendant was able to increase its sales. To illustrate, the table shows that sales of the 1st defendant's Toyota Corolla 4DR KE 3OR-KDF were in the region of 450 per month during the period prior to the first defamatory advertisement on 28 July 1978. Following the publication of the said advertisement, sales for the 1st defendant shot up to around 600 units per month. The 1st defendant's motives in carrying out the said advertisements is none other than to disparage the plaintiff and also to increase the sales of its cars. The defendants claim that there was no malice when the advertisements were published but I find from the facts of the present case, malice was present in all the advertisements.

It is appropriate to refer to my decision in *Chua Jui Meng v. Hoo Kok Wing & Anor* [2000] 6 CLJ 390 wherein I referred to Lord Diplock's judgment in *Horrocks v. Lowe* [1974] 1 All ER 662 at p. 669:

> The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice …

In this case, the defendants not only knew or were reckless as to the truth of the statements but were also motivated by malice to disparage the plaintiff for their own advantage.

Admissibility Of Documents

The plaintiff submits that the documents in CABD 89-92 ought to be admitted in evidence relying on s. 73A of the Evidence Act 1950. I had ruled during the course of the trial that CABD 89-92 would only be admitted as copies of the original and that in the absence of supportive documents, no weight would be attached to them. Up to the point in time when the defendants closed their case, the plaintiff failed to tender any supportive documents. In the circumstances, my ruling stands. The documents at CABD 89-92 comprise a summary of branch bookings for the plaintiff's Datsun during the period of publication of the plaintiff's and defendants' advertisements together with a chart on exchange rate fluctuation. Since I had ruled that the plaintiff ought to tender supporting documents such as acknowledgements and receipts of books, and since the plaintiff had failed to do so, I do not even have to consider the admissibility of these documents under s. 73A of the Evidence Act 1950. In the circumstances, it is my judgment that the late Mr. James Wong, being an employee of the plaintiff at the material time and who was called upon to prepare CABD 89-92 for the sole purpose of the same being used at litigation pending at the material time would certainly be a person interested. The possibility of bias favouring his employer (the plaintiff) is real and his impartiality would certainly be affected.

Damages On Libel

The plaintiff's standing in society is a relevant factor to be taken into consideration in awarding damages. The plaintiff in this case is the sole importer and distributor of Nissan/Datsun cars in Malaysia. Being a corporation having a total of 11 branches all over Malaysia, its reputation is extensive and well known in Malaysia. The extent of the publication of the 1st defendant's advertisements is wide as The New Straits Times is sold throughout the whole of Malaysia. The defamatory and malicious statements published against the plaintiff in a newspaper which has a nationwide circulation is a very relevant factor since such publication to so many persons has a greater effect and thus, a far greater potential to harm the plaintiff than a libel which is published to only a handful of

persons. The natural grief and distress which the directors and officers of the plaintiff had felt at having been spoken of in defamatory terms, and the injury to the plaintiff's pride and self-confidence are also matters that ought to be considered in awarding damages.

It is also pertinent to note that after the publication of the said defamatory advertisements, the plaintiff had instructed its solicitors to issue a letter to the defendants to cease and desist publication and requested for an apology. The defendants' conduct, however, proves non-repentant, as they not only refused an apology to the plaintiff, the defendants also denied liability.

In *Tang Liang Hong v. Lee Kuan Yew & Anor* [1998] 1 SLR 97 and in the course of assessing damages for libel, LP Thean JA said at p. 142 as follows:

> The court preferred the approach advocated by Lord Hailsham of St Marylebone LC in *Broome v. Cassell and Co Ltd* [1972] AC 1027 and approved the following passage from his speech at p. 1071:
>
> > In actions of defamation and in any other actions where damages for loss of reputation are involved, the principle of restitution in integrum has necessarily an even more highly subjective element … it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked the libel, or where perhaps he has libelled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being 'at large'.

And at p. 143, his Lordship continued:

> Thus, the amount of damages awarded in the defamation actions is not only given in relation to circumstances of the past and present but it must be sufficient to vindicate the plaintiff's reputation in the relevant respect in the future. As Lord Hailsham of St Marylebone LC said in *Broome v. Cassell and Co Ltd (supra)* at page 1071:
>
> > Not merely can (the plaintiff) recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.

Taking all these factors and having read all the submissions I award the plaintiff a sum of RM500,000 in damages for libel.

Damages For Malicious Falsehood

On assessing damages under this head, Beldam J's views in *Mark Sallows v. Laurie Griffiths* [2001] 15 FSR 188 at page 195 is relevant. This is what his Lordship said:

> … Damages for malicious falsehood, as Glidewell LJ said in *Kaye v. Robertson* [1991] FSR 62 at 67, are recoverable for damage flowing as a direct and natural result of the publication of the malicious statements. Whilst the plaintiff did not have to show that he had sustained special damage, he did have to show that the statements in the circumstances in which they were made were calculated to cause damage to him in the way of his office, profession or business.

In the case of *Khodaparast v. Shad* [2000] 1 All ER 545, the Court of Appeal held that aggravated damages was recoverable in cases of malicious falsehood. Stuart-Smith LJ stated at p. 556:

> Malicious falsehood is a species of defamation. It is well established that aggravated damages can be awarded for defamation of character for the additional injury to feelings caused by the defendant's conduct both before and after the issue of proceedings. In my judgment, once the plaintiff is entitled to sue for malicious falsehood, whether on proof of special damage or by reason of s. 3 of the Act, I can see no reason why, in an appropriate case, he or she should not recover aggravated damages for injury to feelings.

The plaintiff's reputation was injured as Datsun/Nissan vehicles have always been associated with the plaintiff, and hence, any false advertisements attacking the Datsun cars would seriously affect the plaintiff's reputation as well. Further, the plaintiff has over the years painstakingly built substantial goodwill, reputation and image as the sole importer and distributor of the Datsun/Nissan cars, which were generally regarded as good quality cars.

Taking all factors into consideration, I award the plaintiff under this head RM500,000 as damages inclusive of aggravated damages.

As for the loss by way of special damages, the calculation provided by the plaintiff is too speculative and remote. Further, in the light of my ruling with regard to CABD 89-92 and since the plaintiff's proof of special damages hinges upon these unproven documents, I must find that the plaintiff had failed to prove special damages. I therefore make no award under this head.

a The awards will bear interest at 4% per annum from the date of the first publication of the defendants' advertisements to date of judgment and costs. The 1st defendant will bear 75% of the awards and the 2nd defendant 25% of the same.

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